IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31-03-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE F.M. IBRAHIM KALIFULLA

WRIT PETITION Nos.7720, 7736, 7782, 8032 & 8126 OF 2006
and
WPMP.NOs.8489, 8503, 8594, 8595, 8939,
8940 and 8941 OF 2006

W.P.NO.7720 of 2006

Pon Paramaguru
Director General of Police (Retd.)
No.12, Balaji Avenue,
Thirumalai Road, T.Nagar,
Chennai 600 017. .. Petitioner

Vs.

1. State of Tamil Nadu,
   Rep. by its Chief Secretary,
   Fort St. George,
   Chennai 600 009.

2. The Chief Election Commissioner,
   Election Commission of India,
   New Delhi. .. Respondents

3. A. Raja,
   S/o. Andimuthu,
   2A, Motilal Nehru Marg,
   New Delhi.
   (Respondent No.3 impleaded as
   per order of Court dt.22.3.06
   in WPMP.No.9041/06) .. Intervenor / Respondent

W.P.NO.7736 of 2006

Walter I. Davaram
S/o.T.N. Davaram,
61/14, Buckingam Terrace,
Macnichol Road, Chetput,
Chennai 600 031. .. Petitioner

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Vs.

1. The Election Commission of India,
   Nirvachan Sadan,
   Ashoka Road,
   New Delhi 110 001.

2. The State of Tamil Nadu,
   Rep. by its Chief Secretary
   to Government,
   Fort St. George,
   Chennai 600 009.

3. R. Nataraj, IPS
   Commissioner of Police,
   Greater Chennai City,
   Egmore, Chennai 600 008. .. Respondents

4. A. Raja,
   S/o. Andimuthu,
   2A, Motilal Nehru Marg,
   New Delhi.

5. P. Rathinam,
   Advocate
   183, II Floor, Thambu Chetty Street,
   Chennai 600 001.

   (Respondents 4 & 5 impleaded as
   per order of Court dt.22.3.06
   in WPMP.Nos.8974 & 9020/06) .. Intervenors /
   Respondents

W.P.NO.7782 of 2006

State of Tamil Nadu,
Rep. by its Home Secretary,
Secretariat, Fort St. George,
Chennai 600 009. .. Petitioner

Vs.

1. The Election Commission of India
   rep. by the Chief Election Commissioner,
   Nirvachan Sadan,
   Ashoka Road,
   New Delhi.

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2. The Chief Electoral Officer,
   Public (Elections) Department,
   Secretariat,
   Chennai 600 009. .. Respondents

3. K. Nagaimugan
   S/o. Karuppaiah
   No.2, Alwar Thiru Nagar Annexe,
   Chennai 600 087.

4. A. Raja,
   S/o. Andimuthu,
   2A, Motilal Nehru Marg,
   New Delhi.
   (Respondent No.3 impleaded as
   per order of Court dt.22.3.06
   in WPMP.Nos.8828 & 8829/06) ..Intervenors / Respondents.

W.P.NO.8032 of 2006

V.R. Lakshminarayanan,
S/o.V.V. Rama Iyer,
Director General of Police (Retired)
U-91, 3rd Floor, 3rd Main Road,
Anna Nagar, Chennai 600 040. .. Petitioner

Vs.

1. The Election Commission of India
   rep. by the Chief Election Commissioner,
   Nirvachan Sadan,
   Ashoka Road,
   New Delhi.

2. The State of Tamil Nadu,
   Rep. by its Chief Secretary,
   Fort St. George,
   Chennai 600 009.
3. R. Nataraj, IPS
   Commissioner of Police,
   Greater Chennai,
   Egmore, Chennai 600 008. .. Respondents

W.P.NO.8126 of 2006
A. Adaikalam
HIG-982, Mogappair Erey Scheme,
Mogappair, Chennai. .. Petitioner

Vs.

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1. The Election Commission of India
   Nirvachan Sadan,
   Ashoka Road,
   New Delhi 110 001.

2. The State of Tamil Nadu,
   Rep. by its Chief Secretary to Govt.,
   Fort St. George,
   Chennai 600 009.

3. R. Nataraj, IPS
   Commissioner of Police,
   Greater Chennai City,
   Egmore, Chennai 600 008.

4. A. Raja,
   Union Minister of Environment
   and Forest, New Delhi. .. Respondents

W.P.NO.7720 of 2006 has been filed under Article 226 of the Constitution of India for the issuance of writ of mandamus forbearing the respondents from transferring R. Nataraj, the Commissioner of Police, Greater Chennai to a non-election related post in the guise of conducting a free and fair election, assuming and usurping powers.

W.P.No.7736 of 2006 has been filed under Article 226 of the Constitution of India for the issuance of writ of mandamus for a direction restraining the respondents 1 and 2 from giving effect to the directions issued by the 1st respondent to transfer the 3rd respondent from the post of Commissioner of Police, Greater Chennai.

W.P.NO.7782 of 2006 has been filed under Article 226 of the Constitution of India for the issuance of writ of Certiorari to call for the records pertaining to the directions of the Election Commission of India in its fax message D.O.No.PS/AK/2006 dated 14.3.2006, wherein the Election Commission of India had transferred the Commissioner of Police, Greater Chennai so as to quash the same.

W.P.NO.8032 of 2006 has been filed under Article 226 of the Constitution of India for the issuance of writ of Certiorari to call for the records of the first respondent relating to its fax message D.O.No.PS/AK/2006 dated 14.3.2006 and quash the same.

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W.P.NO.8126 of 2006 has been filed under Article 226 of the Constitution of India for the issuance of writ of mandamus directing the second respondent to implement the order of transfer of the 1st respondent relating to fax message D.O.No.PS/AK/2006 dated 14.3.2006 against the third respondent.

For Petitioner in WP.7720/2006 : Mr.S.R. Rajagopal

For Petitioner in WP.No.7736/2006 : Mr. Vijay Narayan
Senior Counsel for
Mrs. Narmadha Sampath

For Petitioner in WP.No.8032/2006 : Mr.N. Jothi for
Mr.L.P. Shanmugasundaram

For Petitioner in WP.No.8126/2006 : Mr.V. Srikanth

For Petitioner in WP.No.7782/2006 and for the State : Mr.N.R. Chandran
Advocate General
Assisted by
Mr.D. Krishnakumar, Spl.G.P
Mr.S. Venkatesh, Spl.G.P.
Mr.E. Sampath Kumar, G.A.,

WP.No.7720/06:
Respondent 1 : Mr.N.R.Chandran A.G.
For Mr.Krishna Kumar Spl. GP.,
& Mr.E.Sampath Kumar, G.A.

Respondent 2 : Mr.G.Rajagopal, S.C.
For M/s.G.R.Associates.

Respondent 3 : Mr.Shanthi Bhusan, S.C.
For Mr.J.Ravindran.

WP.No.7736/06:
Respondent 1 : Mr.G.Rajagopalan S.C.
For M/s.G.R.Associates.

Respondent 2 : Mr.A.L.Somayaji
Addl. A.G. Assisted by
For S.Venkatesh Spl. GP,
Mr.R.Vijayakumar, G.A.

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Respondent 4	: Mr.Shanthi Bhushan S.C. For Mr.J.Ravindran.
Respondent 5	: Mr.P.Rathinam, Advocate Party in person.
WP.No.7782/06:	
Respondent Nos.1 and 2	: Mr.G.Rajagopalan, S.C. For M/s.G.R.Associates.
Respondent No.3	: Mr.Elephant G.Rajendran
Respondent No.4	: Mr.Shanthi Bhushan, S.C. For Mr.J.Ravindran.
WP.No.8032/06:	
Respondent No.1	: Mr.G.Rajagopalan, SC for Mr.G.R.Associates.
Respondent No.2	: Mr.N.R.Chandran AG for Mr.D.Krishakumar, Spl.G.P. And Mr.E.Sampath Kumar,G.A.
WP.No.8126/2006:	
Respondent No.1	: Mr.G.Rajagopalan SC for M/s.G.R.Associates.
Respondent No.2	: Mr.N.R.Chandran, A.G. For Mr.S.Venkatesh, Spl. GP.
Respondent No.4	: Mr.R.Vidhuthalai S.C. For Mr.J.Ravindran.

COMMON JUDGMENT

P.K. MISRA, J

The factual background as culled out from various writ petitions and the counter affidavit is as follows :-

Mr.R. Nataraj has been functioning as the Commissioner of Police, Chennai, since 18.9.2004. It seems for publication in Chennai Chronicle – a supplement of the Newspaper Deccan Chroncile on 8.3.2006, which was being observed as International Women's Day, R. Nataraj was contacted by a representative of such newspaper to give his opinion regarding an ideal woman. As per the newspaper report, R. Nataraj has stated :

> "An ideal woman is someone who manages both her personal and professional life well. In this respect, I think our chief minister J. Jayalalitha is the perfect example of the ideal woman.
>
> I think she is an icon and every woman should look up to

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her."

Thereafter, publication of such comment in the newspaper appears to have been brought to the notice of the Election Commission. (It is claimed by Mr.A. Raja, a Minister in the Union Government, that it is he who brought it to the notice of the Commission, whereas according to the Commission, even before Mr.A. Raja brought it to the notice of the Commission, a copy of the Chennai Chronicle dated 8.3.2006 was received by the Commission on 13.3.2006). On 14.3.2006, the Deputy Election Commissioner wrote the following letter D.O.No.PS/AK/2006 dated 14.3.2006 to the Chief Secretary to the Government of Tamil Nadu :-

> "... The Commission has desired that Shri R. Nataraj, Commissioner of Police, Chennai may be transferred from his present post immediately. He may be given any post that does not entail election related duties. ..."

Such letter dated 14.3.2006 was faxed to the Chief Secretary. Thereafter, the Chief Secretary of the Tamil Nadu Government wrote letter dated 14.3.2006, a copy whereof has been filed by the State Government as a typed set. The letter is as follows :-

> "... I have received your D.O. Letter dated 14.3.2006 indicating that Thiru R. Nataraj, I.P.S., Commissioner of Police, Greater Chennai may be transferred from his present post immediately and posted to any post that does not entail election related duties.
>
> Thiru R. Nataraj joined as Commissioner of Police, Greater Chennai only on 18.9.2004. The Commissioner of Police, Greater Chennai is a key position of tremendous public importance. The post of Commissioner of Police, Greater Chennai, with a population of over 75 lakhs is a difficult and sensitive assignment. Law and Order management in Greater Chennai takes number one priority given the myriad issues that come up on a daily basis. Adroit management is absolutely essential and only an experienced person capable of long hours of work with clear application of mind can handle this sensitive charge. It is well accepted that Thiru R. Nataraj has done outstanding work in impartially maintaining law and order in an admittedly difficult and complex charge. This is not to extol his virtues but the genuine impression all around is that as a senior Police Officer he has effectively maintained law and order in the City enabling Chennai to be ranked at the very top in efficient law and order management.
>
> As a regular recruit senior I.P.S. Officer of the 1975 Batch, he is very well regarded for his integrity and honesty. There is not even a whiff of a complaint against him on this score. This is an outstanding feature, which has instilled great confidence amidst the general public. This has in no small measure contributed significantly to the enhanced image of the Police Force at Chennai.
>
> As you are aware, the directions of the Election Commission

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to change officers who have completed three years in the same Revenue District have meant that several officers have been moved and new officers are in the process of taking over. Suddenly shifting the Commissioner of Police at this juncture will disrupt the preparations being made to handle the elections. Without a proper leader, law and order management at the time of elections in Greater Chennai could be extremely problematic.

While I am not completely aware of the background of this decision to shift him, it would seem that the remarks made by him and reported in the press are in response to a reporter telephonically asking for a comment on the occasion of International Women's Day. It is not a speech made on any public platform. It is clearly not related to any outstanding public issue. What seems to have transpired was just an instant comment on a telephonic query. There seems to be no intention whatsoever to misuse his position.

We have a serious problem in the efficient management of law and order in Greater Chennai during elections considering the surcharged nature of these elections. Greater Chennai definitely needs a seasoned officer who is fully familiar with the entire metropolitan area along with the officers and men to be able to efficiently and competently manage law and order in the context of the forthcoming elections.

While not in any way attempting to differ with the directions of the Election Commission, I would like to submit my sincere assessment of the position, particularly in the context of the oncoming elections. Thiru R. Nataraj, is well recognized as a competent officer of integrity and shifting him at this stage does jeopardize our preparations for the smooth conduct of the elections. Taking all aspects into account, the balance of advantage would be to retain him at Greater Chennai as Commissioner of Police. This assessment may kindly be considered by the Election Commission of India."

2. The reply to such communication was given by the Deputy Election Commissioner on behalf of the Election Commission on 16.3.2006 in the following words :-

"... Kindly refer to your letter dated 14.3.2006 requesting the Commission to reconsider its decision on shifting of Shri R. Nataraj, Commissioner of Police, Greater Chennai.

The Commission has gone through the contents of your letter and has decided not to change its earlier decision. In view, the State Government of Tamil Nadu is requested to transfer Shri R. Nataraj, Commissioner of Police, Greater Chennai to any post that does not entail election related duties with immediate effect and forward a panel of three officers by 5.00 p.m. tomorrow (17.03.2006) to enable the Commission select a suitable officer for the post of Commissioner of Police, Greater Chennai. ..."

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3. On 17.3.2006, three writ petitions were filed, namely, W.P.Nos.7720, 7736 and 7782 of 2006, first two by two former Directors General of Police and the third one by the State Government challenging the direction of the Commission regarding transfer of the Commissioner of Police, Chennai. On being mentioned before the Hon'ble the Chief Justice, the matters were placed for admission after Lunch Break on 17.3.2006. At that stage, the Election Commission had entered appearance through Mr.G. Rajagopalan, Senior Counsel. After the three writ petitions were entertained and the matter relating to grant of stay was argued, learned Senior Counsel appearing for the Election Commission made a statement that the Election Commission shall not insist upon compliance of the letter dated 16.3.2006 till 23.3.2006. The matters were directed to be taken up on 22.3.2006. By 22.3.2006, another writ petition, W.P.No.8032 of 2006, was filed by another retired Director General of Police seeking to quash the communication of the Election Commission dated 14.3.2006. Similarly, W.P.No.8126 of 2006 has been filed by a retired police official seeking for a direction regarding enforcement of such decision of the Election Commission. Intervention Petitions have been filed on behalf of three persons, including A. Raja, opposing the prayer made by the State Government and supporting the stand of the Election Commission. Such applicants have been added as intervenors. Learned counsels appearing for such intervenors made statement that their petitions can be considered as statement in opposition to the writ petitions filed on behalf of the State Government and the former Directors General of Police and there was no necessity for them to file any formal counter affidavit. Accordingly, hearing of the matter continued after recess on 22.3.2006, 23.3.2006, 24.3.2006 and ultimately the hearing was concluded on 27.3.2006.

4. The main contentions raised in the writ petitions filed by the State and the three former Director General of Police challenging the order of the Election Commission are as follows :-

(1) The Election Commission has no jurisdiction to issue such direction to the State Government regarding transfer of any particular officer, more particularly when notification as contemplated under Section 15 of the Representation of the People Act, 1951 is yet to be issued.

(2) The principles of natural justice have not been followed by the Election Commission and the order has been passed without seeking for any clarification either from the State Government or from the police officer concerned and the subsequent clarification sent by the Chief Secretary to the Government has been completely ignored.

(3) The order has been passed by the Election Commission arbitrarily without any basis and without any justification.

5. The Election Commission in its counter in W.P.No.7782 of 2006 has indicated that the Election Commission has ample jurisdiction under Article 324 of the Constitution as well as Section 13CC of the Representation of the People Act, 1950 to pass the order, which has been passed with a view to ensure free and fair election. The Election

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Commission has also raised the question of locus standi of the former Directors General of Police to file such Public Interest Litigation.

6. The three intervenors as well as the writ petitioner in W.P.No.8126 of 2006 have more or less supported such a stand of the Election Commission.

7. We have heard the learned Advocate General for the petitioner/State in W.P.No.7782 of 2006 and Mr.A.L. Somayaji, Additional Advocate General for the Respondent State in W.P.No.7736 of 2006, Mr. Vijay Narayan, Senior Counsel, for the petitioner in W.P.No.7736 of 2006, Mr.S.R. Rajagopal for the petitioner in W.P.No.7720 of 2006, Mr.N. Jothi for the petitioner in W.P.No.8032 of 2006 and Mr.R. Viduthalai, Senior Counsel, for Respondent No.4 in W.P.No.8126 of 2006, Mr. Santhi Bhusan, Senior Counsel for the intervenor, namely, A. Raja, Intervenor, Mr.P. Rathinam, who has appeared in person in W.P.No.7736 of 2006, Mr.G. Rajendran for the intervenor, namely Mr. Nagaimugan, and Mr.V. Srikanth in W.P.No.8126 of 2006, who has supported the Election Commission.

8. The first and foremost question which crops up for decision is the jurisdiction of the Election Commission to direct the State regarding transfer of any particular officer. The Election Commission in its counter has banked upon the the provisions contained in Article 324(1) and (6) as well as Section 13CC of the Representation of the People Act, 1950 to justify the direction issued.

9. Since much of the disputes relate to jurisdiction of the Election Commission and since the Election Commission is banking upon Article 324(1) and (6) of the Constitution, it is necessary to extract such provisions.

> "324. **Superintendence, direction and control of elections to be vested in an Election Commission.**-
>
> (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as Election Commission).
>
> ...
>
> (6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commission such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause(1)."

10. It is contended by the learned counsels appearing for the petitioners, who are challenging the order passed by the Election Commission, that the jurisdiction of the Commission under Article 324(1)

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cannot be considered to be unbridled and since specific provisions are available under Section 13CC of the Representation of the People Act, 1950 and Section 28A and Section 129 of the Representation of the People Act, 1951, the Election Commission cannot claim unrestricted right to transfer any person on the pretext of purity of election process and cannot impinge upon the authority of the State Government to post officers according to its own discretion. It is contended by them that when specific provisions are available, there is no question of falling back upon the residuary power under Article 324.

11. The scope of Article 324 and other allied provisions has been considered by the Supreme Court on various occasions. In **AIR 1978 SC 851 (MOHINDER SINGH GILL AND ANOTHER v. THE CHIEF ELECTION COMMISSIONER, NEW DELHI AND OTHERS)**, it was observed :-

> "38. Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function. It is true that Art.324 has to be read in the light of the constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualised in Art.327 the Commission cannot shake himself free from the enacted prescriptions. After all, as Mathew, J. has observed in Indira Gandhi (AIR 1975 SC 2299):
>
> > "In our opinion of some of the judges constituting the majority in Bharati's case (AIR 1973 SC 1461) (supra) rule of law is a basic structure of the Constitution apart from democracy.
> >
> > The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere." (p.523 of SCR): (at p.2384 of AIR).
>
> And the supermacy of valid law over the Commission argues itself. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Art.324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.
>
> 39. Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Art.324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, not arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by

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legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. (Emphasis supplied)

The Court further held :

"41. Our conclusion on this limb of the contention is that Article 324 is wide enough to supplement the powers under the Act, as here, but subject to the several conditions on its exercise we have set out."

The Court also held in (in para 77) thus :

"77. We have been told that wherever Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specificated it is otiose. There is no such sequitur. *The silence of a statute has no exclusionary effect except where it flows from necessary implication.* Article 324 vests a wide power and where some direct consequence on candidates emanates from its exercise we must read this functional obligation."

(emphasis supplied)

In the concluding portion of paragraph 92, the Court *inter alia* observed thus (SCC p.452)

"(1)(a) ...

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

(2)(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. *This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.*

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission shall act in conformity with, not in violation of such provisions but where such law is silent Article 324 *is a reservoir of power to act for the avowed purpose of, not divorced from pushing forward a free and fair election with expedition.*"

(emphasis suplied)

Goswami, J in his concurring decision observed (in para 113) thus :

"Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice-President is vested under Article 324(1) in the Election Commission, *the framers of the Constitution took care to leaving*

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scope for exercise of residuary power by the Commission, in its own right, as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission maybe required to cope with some situation which may not be provided for in the enacted laws and the rules." (emphasis supplied)

119. It is true that in exercise of powers under Article 324 (1) the Election Commission cannot do something impinging upon the power of the President in making the notification under Sec.14 of the Act. But after the notification has been issued by the President, the entire electoral process is in the charge of the Election Commission and the Commission is exclusively responsible for the conduct of the election without reference to any outside agency. We do not find any limitation in Art.324(1) from which it can be held that where the law made under Art.327 or the relevant rules made thereunder do not provide for the mechanism of dealing with a certain extraordinary situation, the hands of the Election Commission are tied and it cannot independently decide for itself what to do in a matter relating to an election. We are clearly of opinion that the Election Commission is competent in an appropriate case to order re-poll of an entire constituency where necessary. It will be an exercise of power within the ambit of its functions under Article 324. The submission that there is complete lack of power to make the impugned order under Art.324 is devoid of substance.

...

121. As already pointed out, it is well-settled that election covers the entire process from the issue of the notification under Section 14 to the declaration of the result under Sfec.66 of the Act. When a poll that has already taken place has been cancelled and a fresh poll has been ordered, the order therefor, with the amended date, is passed as an integral part of the electoral process. We are not concerned with the question whether the impugned order is right or wrong or invalid on any account. Even if it is a wrong order it does not cease to be an order passed by a competent authority charged with the conduct of elections with the aim and object of completing the elections. Although that is not always decisive, the impugned order itself shows that it has been passed in the exercise of power under Art.324(1) and Section 153 of the Act. That is also the correct position. Such an order, relating, as it does, to election within the width of the expression as interpreted by this Court, cannot be questioned except by an election petition under the Act." (Emphasis supplied)

12. observations made by the Supreme Court in the aforesaid case have more or less formed the bed-rock of the opinion expressed by the

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Supreme Court in the subsequent cases, upon which reliance has been placed by the Counsels for both sides.

13. The decision reported in **AIR 1984 SC 921 (A.C. JOSE v. SIVAN PILLAI AND OTHERS)**, is, however, required to be extracted in detail as the Counsels appearing for various petitioners have placed strong reliance upon it, whereas the Senior Counsel appearing for the Election Commission and other Counsels supporting the stand of the Election Commission have used rather strong words while contending that such decision cannot be followed as it is contrary to the decision of the Supreme Court in *Mohinder Singh Gill's* case.

14. In *A.C. Jose's* case, the question was related to validity of the election of the respondent in the said case, which had been challenged in an Election Petition before the High Court. The main contention of the unsuccessful candidate was relating to legality of the use of electronic voting machine. The Election Dispute having been dismissed by the High Court, the matter was taken to the Supreme Court. It was contended before the Supreme Court by the successful candidate as well as the Election Commission, which has been impleaded as a party at the appellate stage, that in view of the plenary jurisdiction available under Article 324(1), the direction issued by the Election Commission regarding use of electronic voting machines cannot be considered as an illegality for which the election of a successful candidate can be challenged in the election dispute. The Supreme Court, while setting aside such election in respect of those 50 polling stations where electronic voting machines were used and directing re-poll, had occasion to examine the scope of Article 324. Paragraph 4 reflects the contention of the Election Commission which is extracted hereunder :-

> "4. Art.324 of the Constitution gives full powers to the Commission in matters of superintendence, direction and control of the preparation of electoral rolls and also for the conduct of elections to the Parliament and State Legislatures. It was argued that the Commission being a creature of the Constitution itself, its plenary powers flowing directly from Art.324 will prevail over any Act passed by the Parliament or Rules made thereunder. In order to buttress this argument, it was contended that the manner of voting was a matter coming within the ambit of Arts.324 and 327 which empowered the Parliament to make laws in respect of matters relating to or in connection with the elections to the Parliament or the State Legislatures and would be deemed to be subsidiary to the power contained in Art.324 and if there was any conflict between a law enacted by the Parliament and the powers given to the Commission regarding regulating the conduct of elections to Parliament that law must yield to Art.324, otherwise the very object of Art.324 would be defeated."

Such submission was repelled in the following words in paragraph 5 :-

> "5. This is a very attractive argument but on a closer

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scrutiny and deeper deliberation on this aspect of the matter, it is not possible to read into Art.324 such a wide and uncanalised power, which is entrusted to the Commission as Mr. Jethmalani would have us believe. Part XV of the Constitution contains Arts.324 to 328 which relate to the manner in which elections are to be held, the rights of persons who are entitled to vote, preparation of electoral rolls, delimitation of constituencies, etc., but this is merely the storehouse of the powers and the actual exercise of these powers is left to Parliament under Arts.325 to 329. In other words, Art.324 has to be read in harmony with, and not in isolation of Arts.326 to 329. ...

7. Another golden rule laid down by this Court on the interpretation of statutes is that we should so interpret the language of a Statute as to suppress the mischief and advance the object. It is true that Art.324 does authorise the Commission to exercise powers of superintendence, direction and control of preparation of electoral rolls and the conduct of elections to Parliament and State legislatures but then the Article has to be read harmoniously with the Articles that follow and the powers that are given to the Legislatures under entry No.72 in the Union List and entry No.37 of the State List of the Seventh Schedule to the Constitution. The Commission in the garb of passing orders for regulating the conduct of elections cannot take upon itself a purely legislative activity which has been reserved under the scheme of the Constitution only to Parliament and the State legislatures. By no standards can it be said that the Commission is a third Chamber in the legislative process within the scheme of the Constitution. Merely being a creature of the Constitution will not give it plenary and absolute power to legislate as it likes without reference to the law enacted by the legislatures."

(Emphasis supplied)

After referring to the debate in the Constituent Assembly, it was further observed :-

"9. These observations merely show that the intention of the founding fathers of our Constitution was to make the Commission a separate and independent body so that the election machinery may be outside the control of the executive Government. What Dr. Ambedkar, or for that matter the founding fathers, intended was that the superintendence, direction and control of the preparation of electoral rolls and of all elections to Parliament and State Legislatures should be left to the Election Commission. This object has been fully carried out by the provisions in Arts.324 to 329. Neither the observations of Dr. Ambedkar nor the provisions of the Constitution could ever have intended to make the Commission an apex body in respect of matters relating to elections, conferring on it legislative powers ignoring the Parliament altogether."

After referring to the observations of Justice Krishna Iyer in

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Mohinder Singh Gill's case, it was further observed:-

> "18. The observations, extracted above, furnish a complete answer to the arguments of Mr. Jethmalani and Mr. Asoke Sen as it has been clearly held that Art.324 would operate only in areas left unoccupied by legislation, even if the widest possible connotation is given to the language of Art.324. While summarising the propositions, the Court made the following observations:
>
> "Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission shall act in conformity with, not in violation of such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from pushing forward a free and fair election with expedition. Secondly the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, viz., elections."

15. Even though it is submitted by Mr.G. Rajagopalan, Senior Counsel, appearing for the Election Commission that the observations made by the Supreme Court in *A.C. Jose* case are based on the misreading of the decision of the Constitution Bench in *Mohinder Singh Gill's* case and the observations made in the said decision have been altogether lost sight of, we do not find any conflict between these two decisions. It is to be noticed that even in all subsequent decisions reliance has been placed by the Supreme Court upon the observations made in *A.C. Jose* case.

16. In **AIR 1986 SC 111 (KANHIYA LAL OMAR v. R.K. TRIVEDI AND OTHERS)**, it was observed :-

> "9. ... The superintendence, direction and control of the conduct of elections referred to in Art.324(1) of the Constitution are entrusted to the Commission. The words 'superintendence', 'direction and 'control' are wide enough to include all powers necessary for the smooth conduct of elections. It is, however, seen that Parliament has been vested with the power to make law under Art.327 of the Constitution read with Entry 72 of List I of the Seventh Schedule to the Constitution with respect to all matters relating to the elections to either House of Parliament or to the House or either House of the Legislature of a State subject to the provisions of the Constitution. Subject to the provisions of the Constitution and any law made in that behalf any Parliament the Legislature of a State may under Art.328 read with Entry 37 of List II of the

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Seventh Schedule to the Constitution make law relating to the elections to the House or Houses of Legislature of that State. The general powers of superintendence, direction and control of the elections vested in the Commission under Art.324(1) naturally are subject to any law made either under Art.327 or under Art.328 of the Constitution. The word 'election' in Art.324 is used in a wide sense so as to include the entire process of election which consists of several stages and it embraces many steps some of which ma have an important bearing on the result of the process.
...

16. Even if for any reason it is held that any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules, the power of the Commission under Article 324(1) of the Constitution which is plenary in character can encompass all such provisions. Article 324 of the Constitution operates in areas left unoccupied by legislation and the words 'superintendence', 'direction' and 'control' as well as 'conduct of all elections are the broadest terms which would include the power to make all such provisions. See Mohinder Singh Gill v. Chief Election Commissioner, New Delhi (1978) 2 SCR 272 : (AIR 1978 SC 851) and A.C. Jose v. Sivan Pillai (1984) 3 SCR 74 : (AIR 1984 SC 921).

17. ... While construing the expression 'superintendence direction and control' in Article 324(1), one has to remember that every norm which lays down a rule of conduct cannot possibly be elevated to the position of legislation or delegated legislation. *There are some authorities or persons in certain grey areas who may be sources of rules of conduct and who at the same time cannot be equated to authorities or persons* who can make law, in the strict sense in which it is understood in jurisprudence. A direction may mean an order issued to a particular individual or a precept which many may have to follow. It may be a specific or a general order. One has also to remember that the source of power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is granted is effectively achieved,. Viewed from this angle it cannot be said that any of the provisions of the Symbols Order suffer from want of authority on the part of the Commission, which has issued it."
(emphasis supplied)

17. In **(2002) 5 SCC 294 (UNION OF INDIA v. ASSOCIATION FOR DEMOCRATIC REFORMS AND ANOTHER)**, while considering the question whether the Election Commission is empowered to issue directions regarding filing of affidavit requiring the disclosure of certain aspects by the candidates

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as per the direction of the Delhi High Court, the observations made in *Mohinder Singh Gill's* case were copiously extracted and after referring to the decision of *A.C. Jose's* case and *Kanhiya Lal Omar's* case as well as **(1996) 2 SCC 752 (COMMON CAUSE (A REGISTERED SOCIETY) v. UNION OF INDIA AND OTHERS)** relating to the authority of the Election Commission to issue direction requiring the political parties to submit details of expenditure, the following observations from the *Common Cause case* were extracted :-

> "26. Superintendence and control over the conduct of elections by the Election Commission include the scrutiny of all expenses incurred by a political party, a candidate or any other association or body of persons or by any individual in the course of the election. The expression 'Conduct of election' is wide enough to include in its sweep, the power to issue directions – in the process of the conduct of an election – to the effect that the political parties shall submit to the Election Commission, for its scrutiny, the details of the expenditure incurred or authorised by the parties in connection with the election of their respective candidates."

Ultimately the conclusions were summarised in paragraph 46. The relevant extracats are as follows:-

> "46. To sum up the legal and constitutional position which emerges from the aforesaid discussion, it can be stated that:
>
> 1. The jurisdiction of the Election Commission is wide enough to include all powers necessary for smooth conduct of elections and the word "elections" is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps.
>
> 2. The limitation of plenary character of power is when Parliament or State Legislature has made a valid law relating to or in connection with elections, the Commission is required to act in conformity with the said provisions. In case where law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair election. The Constitution has taken care of leaving scope for exercise of residuary power by the Commission in its own right as a creature of the Constitution in the infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing necessary directions, the Commission can fill the vaccum till there is legislation on the subject. In *Kanhiya Lal Omar case* the Court construed the expression "superintendence, direction and control" in Article 324(1) and held that a direction may mean an order issued to a particular individual or a precept which many may have to follow and it may be a specific or a general order and such phrase should be construed liberally

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empowering the Election Commission to issue such orders.

3. The word "elections" includes the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the process of choosing a candidate. Fair election contemplates disclosure by the candidate of his past including the assets held by him so as to give a proper choice to the candidate according to his thinking and opinion. As stated earlier, in *Common Cause case* the Court dealt with a contention that elections in the country are fought with the help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election. If on an affidavit a candidate is required to disclose the assets held by him at the time of election, the voter can decide whether he could be re-elected even in case where he has collected tons of money. ..."

18. In **(2002) 8 SCC 237 (IN THE MATTER OF SPECIAL REFERENCE NO.1 OF 2002 [GUJARAT ASSEMBLY ELECTION MATTER])**, decided by the Supreme Court on a Presidential Reference under Article 143 of the Constitution, it was observed :-

"76. ... In this view of the matter, the general power of superintendence, direction, control and conduct of election although vested in the Election Commission under Article 324(1), yet it is subject to any law either made by Parliament or State Legislature, as the case may be, which is also subject to the provisions of the Constitution. The word "election" has been interpreted to include all the steps necessary for holding election. In *Mohinder Singh Gill v. Chief Elkection Commissioner, A.C. Jose v. Sivan Pillai* and *Kanhiya Lal Omar v. R.K. Trivedi* it has been consistently held that Article 324 operates in the area left unoccupied by legislation and the words "superintendence", "control", "direction" as well as "conduct of all elections" are the broadest of the terms. Therefore, it is no more in doubt that the power of superintendence, direction and control are subject to law made by either Parliament or by the State Legislature, as the case may be, provided the same does not encroach upon the plenary powers of the Election Commission under Article 324.

...

Regarding the question relating to inter-link between Articles 174(1) and 324, it was observed :-

"... In that view of the matter Articles 174(1) and 324 operate on different field and neither Article 174(1) is subject to Article 324 nor Article 324 is subject to Article 174(1) of the Constitution."

19. From a conjoint reading of all these decisions, it can be

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summarised as :

(1) The provisions contained in Article 324 cannot be read in isolation and such provisions are to be read conjointly with other provisions such as Articles 325, 326, 327, 328 and 329 and also the provisions contained in the Representation of the People Act, 1950 and the Representation of the People Act, 1951.

(2) Article 324 operates in areas left unoccupied by the legislation.

(3) Article 324 is wide enough to supplement the power under the Representation of the People Act and the Commission is empowered to cope with any surprise situation which may not be provided for in the enacted laws and the Rules by issuing necessary orders.

(4) The word 'election' in Article 324 is used in a wide sense so as to include the entire process of election which consists of several stages and it embraces many steps which may have some important bearing in the result of the process (see AIR 1986 SC 111 : (1985) 4 SCC 628).

(5) The purity of the election is fundamental to democracy and the Election Commission can issue suitable directions under Article 324 to maintain purity of the election and in particular to bring transparency in the process of election by directing the political parties to submit the details of expenditure (See (1996) 2 SCC 752).

20. These propositions, which have been culled out from the observations made by the Supreme Court in different decisions are, by and large not disputed by any of the Counsel. The divergence of opinion is not on the source of the authority of the Election Commission. According to the petitioners, who are challenging the direction of the Election Commission, various powers relating to control of the Election Commission over any particular civil servant are covered by various provisions contained in the Representation of the People Act, 1950 and the Representation of the People Act, 1951 and other statutory Rules and the Election Commission can exercise its authority only within the parameters of such provisions. The moot point of the Election Commission and others supporting the Election Commission is to the effect that the direction issued in the present case is not covered within the scope of any statutory provisions and, the Commission has exercised such power under Article 324(1) read with 324(6). It is also to be noted that in the counter affidavit of the Election Commission reference has been made to Section 13CC of the Representation of the people Act, 1950.

21. The Representation of the People Act, 1950, hereinafter referred to as R.P.Act, 1950, is an Act to, inter alia, provide for the preparation of electoral rolls. Part IIA of such Act relates to Officers. Section 13A provides that for each State there shall be one Chief Electoral Officer who shall be such officer of Government as the Election Commission may in consultation with that Government, designate or nominate in this behalf. Under Section 13A(2), the Chief Electoral Officer shall supervise the preparation, revision and correction of all electoral rolls in the State subject to the superintendence, direction and control of the Election Commission. Section 13AA empowers the Election Commission to

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designate an officer of the Government as District Election Officer in consultation with the Government of the State. The District Election Officer under Section 13AA(3) shall co-ordinate and supervise all work in the district or in the area within his jurisdiction [as envisaged in Section 13AA proviso read with Section 13AA(2)] in connection with the preparation and revision of the electoral rolls for the constituencies. Under 13AA(4), the District Election Officer shall also perform other functions as may be entrusted to him by the Election Commission and the Chief Electoral Officer. Similarly, under Sections 13B & 13C, provision has been made regarding appointment of electoral registration officers and Assistant electoral registration officers. Similarly there is provision for appointment of Electoral Registration Officer for each Parliamentary constituency in Jammu and Kashmir or in a Union Territory not having a Legislative Assembly. It is to be noticed that under these provisions the Election Commission has been empowered to designate or nominate the officer concerned, but in consultation with the Government concerned.

Section 13CC, which is relied upon by the Election Commission in support of the decision impugned, is extracted hereunder :-

> "13CC. Chief Electoral Officers, District Election Officers, etc., deemed to be on deputation to Election Commission.- The officers referred to in this Part and any other officer or staff employed in connection with the preparation, revision and correction of the electoral rolls for, and the conduct of, all elections, shall be deemed to be on deputation to the Election Commission for the period during which they are so employed and such officers and staff shall, during that period, be subject to the control, superintendence and discipline of the Election Commission."

22. A mere perusal of Section 13CC makes it clear that such provision is applicable to the officers referred to in Part IIA and any other officer or staff employed in connection with the preparation, revision and correction of the electoral rolls or for the conduct of the elections. Such officers or staff shall be deemed to be on deputation to the Election Commission for the period during which such officers or staff are so employed. During the said period, such officer and staff are subject to the control, superintendence, and discipline of the Election Commission. It is apparent that such control, superintendence and discipline is applicable to the officers or staff coming within the meaning of Section 13CC and not otherwise. It is also obvious that such control, superintendence and discipline is applicable for the period during which such persons are employed in connection with the preparation, revision and correction of the electoral rolls and for conduct of the election. Obviously this will be qua his duty in connection with, as contemplated under Section 13CC, the preparation, revision and correction of electoral rolls and in connection with conduct of election.

23. Part IIB provides for electoral rolls for Parliamentary constituencies. Part III contains the detailed provisions regarding

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preparation of electoral rolls, etc. It is obvious that preparation or correction of electoral roll can be an ongoing process and obviously precede the election.

24. At this stage it can be noticed that notification relating to holding of election is envisaged under Part III of the Representation of the People Act, 1951, in short referred to as "R.P. Act, 1951". This Act was enacted as a sister Act making provisions for conduct of elections, qualification and disqualification for membership, corrupt and illegal practices and other election offences and mechanism for resolution of election disputes. Notification for general election to the House of People is contemplated under Section 14, whereas such notification for the State Legislative Assembly is contemplated under Section 15.

Part IV of such Act relates to administrative machinery for the conduct of elections. It contains various provisions relating to general duties of chief electoral officers and the district election officer. It also empowers the Commission to nominate an observer. Under Section 23 (1), the Election Commission is empowered to designate or nominate an officer of Government or or a local authority as Returning Officer in consultation with the State Government. Under Section 22, an officer of Government or of a local authority can be appointed as the Assistant Returning Officer to perform all or any of the function of the Returning Officer. Under Section 25, the District Election Office with the previous approval of the Election Commission is authorised to provide sufficient polling stations for every constituency. Under Section 26, such District Election Officer shall appoint a Presiding Officer for each polling station and such Presiding Officer shall appoint Polling Officers in the polling stations, but he shall not appoint any person who has been employed by or on behalf of or has been otherwise working for a candidate in or about the election. Under the proviso, such power is also delegated to the Presiding Officer to appoint a temporary polling officer during his absence which should be informed to the District Election Officer.

Section 28A, which is relevant for the purpose of this case, is extracted hereunder :-

> "28A. **Returning Officer, presiding officer, etc., deemed to be on deputation to Election Commission.** - The returning officer, assistant returning officer, presiding officer, polling officer and any other officer appointed under this Part, and any police officer designated for the time being by the State Government, for the conduct of any election shall be deemed to be on deputation to the Election Commission for the period commencing on and from the date of the notification calling for such election and ending with the date of declaration of the results of such election and accordingly, such officers shall, during that period, be subject to the control, superintendence and discipline of the Election Commission."

25. A perusal of this provision makes it abundantly clear that

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the Returning Officer, assistant returning officer, presiding officer, polling officer and any other officer appointed under Part IV for the conduct of any election and the designated police officer shall be deemed to be on deputation to the Election Commission for the period commencing on and from the date of notification calling for such election and ending with the date of declaration of the results of such election. The notification as contemplated in Section 28A is obviously a notification as envisaged in Section 14 or 15 or 16, as the case may be. These officials including the designated police officials during such period shall be subject to the control, superintendence and discipline of the Election Commission. In other words, from the date of notification as contemplated in Section 14 or 15 or 16 till the date of declaration of the results of such election, as contemplated in Section 66, the designated police officials shall be under the control, superintendence and discipline of the Election Commission.

26. There cannot be any dispute regarding the jurisdiction of the Election Commission to exercise superintendence, control and discipline, which would obviously include the jurisdiction to recommend transfer, which under normal circumstances should be construed as binding on the Government regarding such officer. It is required to be noticed that the control as envisaged under Section 28A is during the period when such officer is deemed to be on deputation to the Election Commission and such period commences on and from the date of the notification as contemplated under Sections 14, 15 and 16, as the case may be. Similarly, under Section 13CC of the R.P.Act, 1950, the officers referred to in Part IIA shall be deemed to be on deputation to the Election Commission during the period they are employed in connection with preparation, revision and correction of electoral rolls and for the conduct of election. The period of deemed employment envisaged under Section 13CC is not necessarily dependent upon issuance of any notification whereas the period of deemed employment under Section 28A of the R.P. Act, 1951 is confined to the date of issuance of notification under Section 14 or 15 and the date of declaration of results under Section 66 of the R.P. Act, 1951. This power of control, superintendence and discipline obviously does not extend to any other period.

27. Part VII of the R.P. Act, 1951 relates to corrupt practices and electoral offences. Chapter I of Part VII relates to corrupt practices. Section 123 enumerates what shall be deemed to be corrupt practices for the purposes of the Act. 123(7) lays down as follows :-

> "123 (7) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person with the consent of a candidate or his election agent, any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election, from any person in the service of the Government and belonging to any of the following classes, namely :-
>
> (a) gazetted officers;

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(b) & (c) ...
(d) members of the police forces;
(e) to (g) ... "

However, the rigour of this provision has been whittled down by the proviso extracted hereunder, which was inserted retrospectively by Act 40 of 1975.

"Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any facilities or does any other act or thing, for, to, or in relation to, any candidate or his agent or any other person acting with the consent of the candidate or his election agent (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate's election."

28. Chapter III of Part VII relates to electoral offences. Section 129 lays down that the officers at elections not to act for candidates or to influence voting. Section 129(1) prohibits the officers such as District Election Officer, etc., connected with the conduct or management of the election do any act other than giving of vote for the furtherance of the prospects of the election of a candidate. Section 129 (2) is as follows :-

"129(2) No such person as aforesaid, and no member of a police force, shall endeavour-
(a) to persuade any person to give his vote at an election, or
(b) to dissuade any person from giving his vote at an election, or
(c) to influence the voting of any person at an election in any manner."

Under Section 129(3), a person who contravenes the provisions of Section 129(1) or (2) shall be punished with imprisonment upto six months or with fine or with both. Section 134(1) enumerates the person to whom such provisions are applicable.

29. Rule 5(1) and 5(4) of the All India Services (Conduct) Rules, 1968, hereinafter referred to as "the Conduct Rules, specifically provide :-

"5. **Taking part in politics and elections**. - (1) No member of the Service shall be a member of, or be otherwise associated with, any political party or any organisation which takes part in politics, nor shall be take part in, or subscribe in aid of, or assist in any other manner, any political movement or political activity.
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(4) No member of the Servie shall canvass or otherwise interfere with, or use his ifluence in connection with, or take part in, an election to any Legislature or local authority:

Provided that -

(i) a member of the Service qualified to vote at any such election may exercise his right to vote but where he does so he shall give no indication of the manner in which he proposes to vote or has voted, and

(ii) a member of the Service shall not be deemed to have contravened the provisions of this sub-rule by reason only that he has assisted in the conduct of an election in the due performance of a duty imposed on him by or under any law for the time being in force.

Explanation- The display by member of the Service, on his person, vehicle or residence of any electoral symbol shall amount to using his influence in connection with an election, within the meaning of this sub-rule."

Rule 6 provides :-

"6. **Connection with press or radio.** - Previous sanction of the Government shall not be required when a member of the Service, in the *bona fide* discharge of his duties or otherwise publishes a book or contributes to or participates in a public media.

Provided that he shall observe the provisions of Rule 7, and at all times make it clear that views expressed, are of his own and not those of the Government."

30. Referring to all these provisions it is contended on behalf of the State Government as well as the former Directors General of Police, who are challenging the direction issued by the Election Commission that the Election Commission had no jurisdiction to issue direction regarding transfer of the Police Commissioner as according to them, the Election Commission cannot purport to exercise any superintendence, control and discipline over any police officer until such police officer is designated for the time being by the State Government for the conduct of election. It is further submitted that if any police officer has violated any provision contained in Part VII of the R.P. Act, 1951 or under the Conduct Rules, appropriate action can be taken by the appropriate authority. According to the learned Advocate General, Additional Advocate General, Mr. Vijay Narayan, Mr.N. Jothi and Mr.S.R. Rajagopal before issuance of notification as contemplated under Section 15 of the R.P. Act, 1951, the Election Commission has exceeded its jurisdiction by directing the State Government to transfer a particular police officer. In this connection, learned counsels have placed reliance upon several decisions of this Court and Kerala High Court. It is necessary to notice those decisions at this stage.

31. In **1995 Writ L.R. 309 (STATE OF TAMIL NADU, REP. BY ITS**

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CHIEF SECRETARY, MADRAS v. THE ELECTION COMMISSION OF INDIA, NEW DELHI), the writ petition was filed by the State of Tamil Nadu challenging the order of the Election Commission imposing total ban on transfer of officers of the State Government connected with the scheme of preparation and distribution of photo identity cards with effect from 1.7.94 till the said work was completed. Such order was challenged by the State Government by raising contention to the effect that to place such restrictions on the State Government in the matter of personnel management on the ground that it would disrupt the electoral process is stretching and rationale to illogical extremes and indeed it interfere with the right of the State Government to determine exigencies of public interest and running the day-to-day administration of the State. The stand of the Commission was to the effect that the order had been passed in exercise of jurisdiction under Article 324(1) and 324(6) of the Constitution and Section 13CC of the R.P. Act, 1950. Justice Shivaraj Patil, as His Lordship then was, after referring to the provisions contained in Article 324(1) and 324(6), 327 of the Constitution, 13CC of the R.P. Act, 1950 and 28A of the R.P. Act 1951 and after referring to the executive power of the State as envisaged under Article 162, observed :-

> "26. Article 324 deals with the powers of the Election Commission in regard to specific subject of conduct of elections to Parliament and Legislatures of States and election to the offices of the President and Vice-President including the preparation of electoral rolls. The power of superintendence, direction and control of elections are vested with the Election Commission under Article 324(1). The powers under Article 324 (1) are wide so far as they relate to preparation of electoral rolls and conduct of elections in the matter of superintendence, direction and control. All such powers incidental to, connected with, and necessary for preparation of electoral rolls and conduct of elections are available to the Election Commission. Any communication, order or action of the election commission must have nexus in relation to the matters stated under Article 324(1) of the Constitution.
>
> 27. Article 162 deals with the executive power of the State. Article 324(1) deals with the power of superintendence, direction and control of the election commission in regard to preparation of electoral rolls and conduct of election. I do not find any conflict between the two. Both occupy different fields. Assuming, in examining the correctness of the impugned orders/Communications, difficulty arises, it is appropriate to resolve the difficulty by adopting the harmonious interpretation which will advance the objects of both the Articles. In my view, looking to Article 324(1) and Sections 13A/13B and 13C, the Election Commission has power to require the officers and staff from any State Government concerned, for the purpose of preparation of electoral rolls and conduct of elections. In order to see that such officers and staff carry out the work entrusted to them properly, punctually/, and timely, in order to

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conduct the elections freely and smoothly and fairly, the election commission should have power of superintendence, direction and control including the disciplinary power."

After referring to the decisions of the Supreme Court in **AIR 1978 SC 851, AIR 1984 SC 921** and **AIR 1986 SC 111,** it was further observed :-

"43. In the light of the above decisions, it is clear that the Election Commission can issue directions or pass orders in all the matters relating to conduct of election and preparation of electoral rolls subject to the laws made by Parliament or legislatures, and such powers can be exercised by the Election Commission in an area not occupied by other statutory provisions. Under Article 162 of the Constitution the executive powers of the State are exercised. The State service is one of the subjects falling in the State list at entry 41 in list No.II of the Constitution. This being the position the power of appointment, transfer and other matters relating to service vests with the State Government. Article 324, as held by the Supreme Court in the aforementioned decisions, cannot be taken as conferring the plenary powers on the Election Commission, and the provisions of Articles 324 to 329 of the Constitution must be read harmoniously so as to suppress the mischiefs and advance the object sought to be achieved under the said provisions. The President or the Governors, as the case may be, have to necessarily provide the required staff and officers i.e., the machinery for conducting of free and fair elections and preparation of electoral rolls as may be required by the Election Commission.

44. Under Article 324 read with the relevant provisions under the Representation of the People Acts 1950 and 1951, the Election Commission has power to superintendence, direct and control and discipline such officers and staff as they are deemed to be on deputation during the relevant period. The Officers and staff provided for the preparation of electoral rolls and issue of photo identity cards are Officers designated and not officers named. The designated officers happen to the officers holding different posts in the State Service such as Collectors, District Revenue Officers, Revenue Divisional Officers / Sub-Collectors, Tahsildar, Municipal Commissioners etc. They have several functions to discharge, one of the functions may be preparation of electoral rolls. The Election Commission has certainly powers to superintend and control such officers for the purpose of carrying out the conduct of elections, preparation of electoral rolls and issue of photo identity cards. It is well within its powers to insist that the required number of Officers and Staff must be made available, and even if such officers and staff are to be transferred they should not be transferred without providing a substitute so that the work of preparation of electoral rolls and issue of photo identity cards is not hampered or handicapped in any way, to ensure holding of free and fair

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elections smoothly. But the Commission insisting that all the large number of Officers holding various ranks and positions and the staff engaged in preparation of electoral rolls cannot be transferred at all without the prior permission/approval of the Election Commission, in my opinion, is going beyond the powers available to the Election Commission. As stated above already, transfer is an incident of service, and the State Government has the power to deal with its servants in the matter of transfer and posting. There may be several grounds and reasons, and certain exigencies may also demand for immediate transfers. Seeking prior permission of the Election Commission before any Officer involved in the preparation of electoral rolls is transferred results in difficulties and even it may affect the running of the administration in the State smoothly and properly. Sometimes it may affect the Law and Order situation if a particular officer or officers are not transferred or posted.

45. Under these circumstances, the impugned orders so far as they impose a ban on transfer of officers connected with the preparation of election rolls and issue of photo identity cards, in my opinion, cannot be sustained. It is open to the Commission to insist on posting of Officers and Staff before an officer or staff is transferred, to keep the time bound work of preparation of electoral rolls and issue of photo identity cards going on and to ensure the completion of the work within the time. It is clear that the Officers and Staff whenever they are engaged in the preparation of electoral rolls or issue of photo identity cards, are amenable to the disciplinary jurisdiction of the Election Commission. Being under the superintendence, control and direction of the Election Commission, if any Officer or member of the staff has failed to act or disobeyed the orders, or commits any default, he is liable for omissions and commissions during the period in which he was concerned with the work. Merely because such an officer is transferred it cannot be said that he is absolved if his acts of omission and commission. Appropriate action can always be taken."

32. **W.A.NOs.756 and 757 of 1995** were filed by the Election Commission against the aforesaid decision. Such appeals were dismissed by the Division Bench by judgment dated 18.10.1995. Justice D. Raju, as His Lordship then was, speaking for the Bench, after referring to various provisions and extensively quoting from the decision of the Supreme Court in AIR 1984 SC 921 and AIR 1986 SC 111 and after analysing the provisions contained in Articles 324, 327, 162 of the Constitution and Section 13CC of the R.P. Act, 1950 and Section 28A of the R.P. Act, 1951, observed :-

"15. ... The Apex Court, in more than one decisions referred, to supra, has held in unmistakable terms that in the exercise of such powers the Election Commission cannot interfere with the powers vested in some other Authority by the Constitution or by any law validly mad and in force and however

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wide the powers may be its orders must be traceable to some existing law or to be considered necessary to effectively enforce such existing law and not in violation of any of the statutory provisions or the existing law. The law declared by the Supreme Court leaves no room for any doubt that even the Election Commission cannot in discharge of its functions and duties act in derogation of a valid existing law and the law in force both the Constitution and statute law and subject to the same the Election Commission can act or pass orders even in the absence of any specific provision in respect of a particular matter but in no case against a provision of law. In substance, it is in the nature of a residuary power to deal with any situation not dealt with otherwise by any law.

16. The Parliament has taken care to provide for the status and position of the staff made available by the President or the Governor of a State for the discharge of the functions conferred under the Constitution and the law made by the Parliament, on the Election Commission. Section 13CC of the Representation of the People Act, 1950, enacted to provide for the allocation of seats in and delimitation of constituencies for the purpose of election to the House of the People and the Legislature of the States, the qualification of voters at such elections, the preparation of electoral rolls and the manner of filling seats in the Council of States stipulate that the Officers referred to in Part II-A of the Act (Chief Electoral Officers, District Election Officers, Electoral Registration Officers and the Assistant Electoral Registration Officers) and any other officer or staff employed in connection with the preparation, revision and correction of the electoral rolls for and the conduct of all elections "shall be deemed to be on deputation to the Election Commission for the period during which they are so employed and such officers and staff shall, during that period, be subject to the control, superintendence and discipline of the Election Commission." Likewise Section 28-A of the Representation of the People Act, 1951, enacted to provide for the conduct of elections to the House of the Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such election stipulate that the Returning Officer, Presiding Officer, Polling Officer and any other Officer appointed under Part IV of the said Act, and any Police Officer designated for the time being by the State Government for the conduct of any election shall be deemed to be on deputation to the Election Commission for the period commencing on and from the date of the notification calling for such election and ending with the dat of declaration of the results of such election and accordingly such officers shall during that

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period be subject to the control, superintendence and discipline of the Election Commission."

Ultimately the Division Bench concluded :

"21. ... The provisions contained in the Constitution of India viz., Articles 324 and 327 or Section 13CC of the 1950 Act or Section 28A of the 1951 Act, do not, in our view, confer any such absolute or unlimited powers of control over the category of officers of the State Government deemed to be on deputation for a limited purpose to the Election Commission so assume an over all control over the State Officers as to impose even ban on normal transfer of such officers in the exigencies of State Administration and thereby create a stalemate or a hiatus in running efficiently the State Administration giving credence to the claim of the appellant and according the seal of approval to such arbitrary, unreasonable, illogical and unwarranted interference with the State Administration would tantamount to permitting the appellant to hold the reigns of State Administration itself and such could not been the intention or object either of the framers of the Constitution or the Parliament of India. The independence envisaged to the Election Commission ought to inculcate in the functionary of the Constitutional Institution an high sense of responsibility mutual respect to other equally constitutional functionaries envisaged in the constitution and reverence to the fundamental principles of Rule of Law rather than hysterically giving vent to its own assumed, unlimited statute and powers unmindful of the conferment of powers under the constitution upon various other institutions. Election Commission has been created to achieve a purpose and goal and it is, therefore, designed as a means to an end and therefore cannot be allowed to be thought of as an end in itself. Apparently, the instant action, in our opinion, can also be viewed as one instance similar to those several innovative clause of the Election Commission which earned its rebuke from the Apex Court in the decision reported in 1995(4) SCALE 285 (T.N. SESHAN, CHIEF ELECTION COMMISSIONER OF INDIA v UNION OF INDIA AND OTHERS). It is necessary and relevant to notice that for the purpose of an for doing the election work, the State Officers and their staff are deemed to be on deputation to the Election Commission, but their services are not transferred to the Election Commission and they do not become and cannot be considered to have become the servants of the Commission and thereby ceased to be the State Government Servants. The very act of the Election Commission in banning the transfers by the State Government proceeds from the premises that the State Government has the power of transfer the Officers and the staff deemed to be on deputation to the Commission and such Officers and the Staff continue to be the Stat Government Servants and the Stat Government has power to transfer them. If that be so, the Election Commission cannot claim and does not possess any such

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power to prohibit the State Government from effecting transfer of its Officers as and when the exigencies of the administration require.

22. Viewed from any angle, either in the context of the powers under the provisions of law claimed or as a power of necessity too we do not consider it necessary for the Election Commission to be recognised to possess such powers as to enable it to validly impose a ban of the nature under the impugned proceedings. The normal and due or effective exercise of control, supervision or discipline envisaged under the Statutory Laws in question are not in any manner defeated by questioning the impugned proceedings and denying to the Election Commission such absolute powers over the State Administration. It is one thing to state that the Election Commission can issue directions to the other Administrative Authorities or Bodies which must be respected by them but another thing to deny the State Government powers over its own Officers to transfer, promote and post them from time to time or periodically depending upon the dictates of the exigencies of Administration. Despite giving serious consideration to the claims made on behalf of the appellant, we are unable to persuade ourselves to agree with the appellant. It is not also the plea on behalf of the appellant before us with illustration of any instances as to indiscriminate transfers in the State having impeded the progress of the Election work and in the absence of any such claim substantiated before us, there is no warrant to sustain such drastic power claimed by the appellant, on mere apprehensions and that too to adopt such extreme course without even contemplating any alternatives to such course. The fact that permissions when sought for are liberally granted or will be granted by the Election Commission is no justification or an effective answer to the claim or assertion of powers and an adjudication on the respective scope of powers and authority of the parties before us. The reasons assigned by the learned single Judge to allow the writ petitions on the terms contained and specified in the order under appeal are well merited and unassailable and accord with the settled principles of law laid down by the Supreme Court of India, noticed supra. But, at the same time, we do make it clear that the State Government also must be alive to its responsibilities and obligations to assist the Election Commission in all respects, act with great care, caution and circumspection depending upon the practicalities of the situation and adopt a pragmatic path and ensure that officers connected with the works of the Election Commission are transferred only under the very special circumstances and public exigencies and interest and that the incumbents shall be relieved only after posting suitable substitutes in their places. This safeguard, in our view, which has also been assured to be observed by the 1st respondent takes sufficient care of the possible problems posed by the appellant

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and to allay their fears of tardiness or lethargy in the timely execution of the work of the Election Commission."

33. The decision of the Kerala High Court reported in **1995 Labour I.C. 682 (T.V. MADHUSOODANAN v. CHIEF ELECTION COMMISSION AND ANOTHER)** appears to be more or less similar to the present case. The petitioner in the said case was promoted to the cadre of DG and IGP as per order dated 22.4.1994 with effect from 1.5.1994 in the retirement vacancy of the then DG and IGP. A bye-election had already been notified on 26.4.1994. The State Government had received a communication from the Election Commission that appointment of the petitioner as DG and IGP should be cancelled and *status quo ante* should be restored. The State Government had been directed to comply with the direction by 5.5.1994. Such direction of the Election Commission was challenged by the petitioner. It was contended on behalf of the Election Commission that by the time the order of the State Government was passed on 22.4.1994, formal notification regarding Guruvayur Assembly constituency was issued. Instructions had been issued under Article 324 to adhere certain norms during the period of election. The officer posted in the cadre of DGP and IGP are directly connected with the election and were subject to the control of the Commission, and,therefore, a direction had been issued to cancel such appointment with a view to ensure free and fair election. The State Government took the stand that the appointment of the petitioner was a routine affair which could not have been postponed for administrative reason and in public interest. It was also contended that DGP did not come under any of the category of the persons connected or likely to be connected with the conduct of general election. The question posed by the Court was whether the Election Commission was legally empowered to issue such direction by virtue of the powers conferred under Article 324 or under Section 13CC of the R.P.Act, 1950 or Section 28A of the R.P.Act, 1951. Justice K.G. Balakrishnan of Kerala High Court, as His Lordship then was, after analysing the provisions contained in Article 324 and other statutory provisions and after referring to the decision of the Supreme Court in AIR 1978 SC 851 and AIR 1984 SC 921, repelled the contention of the Election Commission in the following words :-

"11. Counsel for the Election Commission contended that there is no parliamentary legislation or rule made in respect of control, superintendence and direction over the members of the staff deputed for election duty and, therefore, the Election Commission can pass orders regarding the transfer and posting of any officer who has got any connection with the conduct of election. I am unable to accept this contention. Powers of the Election Commission are clearly outlined under Art.324(6) read with S.13CC of the Representation of the People Act, 1950 and S.28A of the Representation of the People Act, 1951. The power, superintendence and control could be exercised in respect of officers who are deputed for election work. Counsel for Election Commission further contend that DG and IGP is an

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election related officer as he has got overall control over the entire police force of the State. Reliance was placed on Annexure-R1 letter issued by the Election Commission. In clause 4(iv) of the letter it is only stated that the Superintendent of Police, Deputy Superintendents of Police and Assistant Superintendents of Police and other senior level police officers like S.H.O who are entrusted with the task of maintenance of law and order are election related officers. There is nothing in evidence to show that the service of these officers were requested by the Election Commission under Art.324(6) of the Constitution. Further, there is nothing in evidence to show that the DG and IGP was designated by the State for the conduct of election. There is also nothing in evidence to show that the Governor of the State made available to the Election Commission the service of the DG and IGP for the conduct of the election. It is clear that the Election Commission had absolutely no control and superintendence over the DG and IGPO and the impugned direction passed by the Election Commission was without jurisdiction.

...

13. In short, the position is that the petitioner, who is the DG and IGP of the State was not under the administrative control of the Chief Election Commission. The Commission did not request to avail the service of the petitioner under Article 324(6) of the Constitution. The power, superintendence and control of the Election Commission will extend over such officers, who are entrusted with the election duties or whose services have been requested and obtained under Art.324(6) of the Constitution. The Election Commission can issue direction regarding posting and transfer of officers who are deputed for election duty or officers who are deemed to be on deputation to the Election Commission by virtue of the powers exercised by the Commission under Art.324(6) of the Constitution read with S.13CC of the Representation of the People Act, 1950 and S.28A of the Representation of the People Act, 1951. Petitioner is not an officer coming under any of these categories. The Election Commission was not authorised to give any direction to the State Government regarding the posting or transfer of the petitioner. The direction given by the Election Commission regarding the posting of the petitioner is only to be quashed. I set aside the direction issued by the Chief Election Commission and allow the Original Petition."

34. Learned counsel for the Election Commission submitted that such decision is based only upon certain observations made in **AIR 1984 SC 921** and cannot be said to have laid down the proper law as the effect of many other decisions of the Supreme Court are to the contrary.

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We do not think the learned counsel is justified in making such a sweeping submission. In the aforesaid decision, reference has been made not only to **AIR 1984 SC 921** but also **AIR 1978 SC 951**. As a matter of fact, these two decisions are consistently referred to by the Supreme Court in all the subsequent decisions. From the aforesaid decision of the Kerala High Court, it is apparent that so far as the jurisdiction of the Commission in the matter of posting of police officer is concerned, the matter is governed by the provisions contained in Section 28A of the R.P. Act, 1951 and the Election Commission cannot fall back upon Article 324 to contend that it has absolute power to give direction regarding posting of any person or transfer of any person even though such a person does not come within the jurisdiction of Section 28A or Section 13CC.

35. As rightly submitted by the learned Advocate General and Addl. Advocate General for the State that the direction issued by the Election Commission cannot be justified by taking resort to Section 28A or 13CC. Even the learned counsel for the Election Commission does not rely upon Section 28A to justify the order issued. He has fallen back upon the provisions contained in Article 324(1) read with 324(6) and Section 13CC. However, Section 13CC is applicable only to a particular type of officials connected with election work. By no stretch of imagination it can be said that this order of transfer can be justified by taking resort to Section 13CC. As a matter of fact, it can be said in all fairness that even Mr. Santhi Bushan, learned Senior Counsel appearing for the Intervenor, namely, A. Raja, did not try to justify the order on the anvil of Section 13CC and 28A, but confined his submission to the scope of power under Article 324(1) read with 324(6) of the Constitution.

36. Learned counsel for the Election Commission has also placed reliance upon Article 324(6). Article 324(6) empowers the Election Commission to depute officers required by it for discharging its functions. We do not think such provision would empower the Election Commission to transfer a person on the specious plea of maintaining purity of election even before issuance of notification under Section 15 of the R.P. Act, 1951. The order does not purport to be a request for posting of any officer in any election related work.

37. Since specific provisions are available, Section 13CC of the R.P. Act, 1950 and Section 28A of the R.P. Act, 1951, in our considered opinion, the Election Commission cannot fall back upon Article 324(1) or 324(6) to justify such a direction regarding transfer of a police officer. However, there cannot be any two opinion regarding the fact that once the notification as contemplated under Section 15 is issued, the Election Commission may have jurisdiction over the designated police officials as contemplated under Section 28A.

38. The question is relating to the control to be exercised by the Election Commission over the concerned officials. The matter is specifically envisaged under Section 13CC of the R.P. Act, 1950 as well as

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Section 28A of the R.P. Act, 1951. Apart from the above, specific provisions are also contained in Section 129 of the R.P. Act, 1951. The relevant Conduct Rules also relate to the manner in which an official is required to conduct himself at or about the time of election. In our considered opinion, all these provisions cover the entire gamut relating to exercise of discipline and control over the officials concerned and, therefore, there is no question of falling back upon the residuary power as envisaged under Article 324 of the Constitution. Even though there is a reservoir of jurisdiction under Section 324(1), the key to the sluice gate of such reservoir is contained in various statutory provisions and Rules and there is no other way to open the gate. Any other interpretation is likely to open a flood gate which may convert the Election Commission to an *imperium in imperio* and which is likely to unsettle the delicate balance of separation of power as well as the federal structure which are considered as salient feature of the Constitution of India.

39. The learned Senior Counsel for the Election Commission has also submitted that the Model Code of Conduct became effective from the date the Election Commission declared the election schedule and therefore he had ample jurisdiction to direct the transfer to maintain purity of election. However, it is practically conceded by all the Counsels appearing for the respondents / intervenors that the provisions contained in the Model Code of Conduct are for the guidance of political parties. It is apparent from the R.P. Act, 1950 and R.P. Act, 1951 that control over the various officials including the designated police officials, as contemplated in Section 13CC of the R.P. Act, 1950 or Section 28A of the R.P. Act, 1951 is to be exercised in the manner indicated in such provisions and there is no scope for exercising any further disciplinary control over such officials beyond the purview of the provisions contained in these Acts. The introduction of the Model Code of Conduct, which is primarily intended to control the activities of the political parties, does not have the effect of enlarging the jurisdiction of the Election Commission in the matter relating to exercise of control over such officials. It has not been pointed out which particular Model Code of Conduct was violated by which political party far less by the Police Commissioner warranting the present impugned direction to transfer. Similarly nothing has been pointed out as to how a police official, who is yet to be designated for the purpose of election as contemplated in Section 28A has violated the Model Code of Conduct. Even the learned counsel for the Election Commission and other intervenors have failed to point out violation of any other Conduct Rules applicable to the concerned police officer.

40. Learned counsel appearing for the Election Commission has contended that during the election period no public servant is expected to eulogise any particular leader which is likely to sway the opinion of the voters in favour of such leader. The moot question is whether it can be said that the election process has started. It is no doubt true that the

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Model Code of Conduct has been made applicable (more by way of compromise or mutual acceptance rather than by its own force) with effect from the date when the Election Commission announce the dates for election. On a bare reading of the decision of the Supreme Court in **AIR 1978 SC 851**, which has been subsequently followed, it is apparent that the election process can be said to be set in motion only upon issuance of notification as contemplated under Sections 14, 15 or 16 of the R.P. Act, 1951, as the case may be, and not before that.

41. In this connection it has been submitted that the expression 'Election Process' includes several stages preceding the formal issuance of notification under Section 14 or 15 or 16 of the R.P. Act, 1951. In this connection, reliance has been placed mainly upon the observations made by the Supreme Court in **(2002) 5 SCC 294** (cited supra) and, therefore, even before issuance of formal notification under Section 15 or 16 of the R.P. Act, 1951, the Election Commission with a view to conduct free and fair election has ample jurisdiction to issue any specific direction to post appropriate officers against appropriate posts, more particularly after declaration of the schedule of the election, from which date the Model Code of Conduct becomes applicable and the people be conscious that the election is round the corner.

42. So far as the decision of the Supreme Court relied upon by the Election Commission is concerned, such decision is obviously applicable to a stage after the issuance of notification under Section 15 or 16 of the R.P. Act, 1951. However, even assuming that various stages of election would also include any period after declaration of the schedule, the disciplinary power and control of the Election Commission as envisaged under the R.P. Act do not get enlarged. If the Model Code becomes enforceable, the Election Commission is empowered to take action as contemplated in the Model Code or any other provision applicable.

43. In its counter affidavit, the Election Commission has taken the stand,

> "17. ... In any event, it is submitted that the State Government is estopped in law from questioning the jurisdiction of the Election Commission to transfer any officer in view of the order made by the Supreme Court dated 21.9.2000 in W.P.(Civil) 606 of 2003 wherein the Hon'ble Supreme Court has disposed of the Writ Petition filed by the Election Commission of India based on a Memorandum of Compromise entered into between the Election Commission of India and the Union of India which was accepted in toto by the States of Tripura, Maharashtra, Andhra Pradesh, Mizoram and Tamil Nadu. The following provisions of the Memorandum of Agreement are relevant and hence are quoted hereunder:-
>
> "That the disciplinary functions of the Election

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Commission of India over officers, staff and police deputed to perform election duties during election period shall extend to:

(a) Suspending any officer/ official / police personnel for insubordination or dereliction of duty;

(b) Substituting any officer / official / police personnel by another such person and returning the substituted individual to the cadre to which he belongs, with appropriate report on his conduct;

(c) Making recommendation to the competent authority for taking disciplinary action, for any act of insubordination or dereliction of duty, while on election duty. Such recommendation shall be promptly acted upon by the disciplinary authority, and action taken will be communicated to the Election Commission, within a period of six months from the date of the Election Commission's recommendations;

(d) The Government of India will advise the State Governments that they too should follow the above principles and decisions, since a large number of election officials are under their administrative control".

In the circumstances, it is not open to the Petitioner the State of Tamil Nadu to question the jurisdiction of the Election Commission of India with regard to the transfer of officials."

44. We do not think that the Memorandum of Agreement before the Honourable Supreme Court, extracted by the Election Commission, can be read to mean that the Election Commission has any disciplinary jurisdiction over officers, staff and police deputed to perform election duties during the period not contemplated under Section 13CC of the R.P. Act, 1950 or Section 28A of the R.P. Act, 1951. It is obvious that the question of exercising any disciplinary control can be only during the period in which such officers, staff and police are deputed to perform election duties and not otherwise.

45. In paragraph 19 of the counter affidavit, it has been emphasised that it is open to the Election Commission by exercising the power under Article 324 of the Constitution to enforce the Model Code of Conduct even before the notification is issued and such Model Code of Conduct can be enforced from the date of enforcement of the election schedule. It has been further submitted that the the decision of the Punjab High Court in **Civil Writ Petition NO.270 of 1997 dated 27.5.1997** in ***Harbans Singh Jalal v. Union of India and others (1997-2 PLR 778)*** that the Model Code of Conduct is enforceable from the date of announcement of the Election Schedule has been upheld by the Supreme Court by order dated **26.4.2001** in **SLP.No.22724 of 1997.**

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46. The question in the present case is not as to whether the Model Code of Conduct can be enforced or not and, if so, from which date. Even assuming that the Model Code of Conduct has become legally enforceable entailing any legal consequence for its violation, whether the action of the Election Commission directing transfer of a particular Police Officer, who is yet to be designated as contemplated in Section 28A of the R.P. Act, 1951 or who is yet to be engaged in connection with the election as envisaged under Section 13CC of the R.P. Act, 1950, is justified or not. Moreover, nothing has been brought to our notice to indicate that there has been any particular violation of the Model Code of Conduct by the official concerned. It is also no where whispered that any political party has violated the Model Code of Conduct on this aspect.

47. It has also been contended by the Election Commission that it has jurisdiction nay duty to take steps in advance to ensure free and fair election and the Election Commission need not wait till the formal notification to be issued for the purpose of ensuring discipline by taking disciplinary action on the erring officials. It is also submitted in this connection that to wait till issuance of formal notification would not be proper as the Election Commission may not have sufficient time to keep the election machinery in readiness to conduct a free and fair election, and, therefore, necessary direction can be issued for posting a proper person in a proper post and for that purpose the order of transfer can be issued.

48. It is no doubt true that the Election Commission requires personnel for smooth holding of election and even in a given situation it should have ample authority in the matters relating to law and order. However, the period commencing from the date of notification cannot be said to be insufficient period for pursuing the aforesaid goal of the Election Commission.

49. The Statement of objects and reasons for introducing various amendments, including Section 13CC and 28A, are required to be noticed. So far as Sections 13CC and 28A are concerned, paragraph 5(i) is relevant and extracted hereunder :-

> "5. The proposals contained in the present Bill are briefly explained below:-
>
> (i) At present, all the work relating to the preparation, revision and correction of the electoral rolls and the actual conduct of elections, is carried out by the designated officers of the State Governments concerned. It is felt that the provisions of the Representation of the People Act, 1950 and the Representation of the People Act, 1951, in this regard should be clearly defined so that during the relevant period, these officers would, while discharging functions relating to elections, be under the control, superintendence and discipline of the Election Commission."

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50. Learned counsel for the Election Commission and Mr. Santhi Bushan have contended that when the election date has been declared, any statement, which is likely to sway the opinion of the voters should be avoided by the public servants and to prevent any such misgiving, the Commission is well justified in issuing the order of transfer as otherwise a free and fair election may not be possible under such contingencies, particularly when a public servant making such statement is holding any post.

51. In our considered opinion, if such a submission is accepted and taken to its logical end, the Election Commission can issue direction disapproving any of the policy decision of a particular Government or create hurdles in the running of the day-to-day administration on the ground that ultimately where the election would be held after the normal gap of about 5 years, there may not be free and fair election as the opinion of the public may be swayed by any particular policy. It is an open secret that some of the policy decisions of any particular Government at times may give the impression as if such decisions are made with "half an eye" on the election or in other words with a view to sway public opinion in favour of a particular party. Since election is inevitable at least once in every five years, the Election Commission can always say that particular policy should not be implemented by invoking jurisdiction under Article 324(1) of the Constitution. We are not convinced that Article 324(1) was intended to convert the Election Commission to an "*imperium in imperio*".

52. It is submitted that even though in a technical sense election process can be said to begin with issuance of notification under Section 15 of the R.P. Act, 1951, yet there are other stages preceding before such issuance of notification which can be construed as stages relatable to "election" in a wider sense.

There cannot be any serious quarrel over this proposition. As is seen from the provisions contained in the R.P. Act, there are certain exercises undertaken such as preparation and correction of voter list, which obviously relate to the period prior to issuance of notification under Section 15. The provisions contained in R.P. Act, 1950, including Section 13CC, take care of such situation. Even it can be accepted that the Model Code of Conduct becomes enforceable from an anterior date i.e, from the date of declaration by the Election Commission even before formal issuance of notification under Section 15. If there is any violation of the Model Code of Conduct, thereafter it may be open to the Election Commission to take appropriate action as contemplated either under the Model Code of Conduct or under any allied provision or order which empowers the Election Commission to take such action. The consequences envisaged under Section 28A of the R.P. Act, 1951 are available only on the issuance of notification. Similarly, as contemplated under Sections 126 and 135C of the R.P. Act, 1951, the ban relating to holding of public meeting or sale of liquor became effective during the period of 48 hours prior to the time of conclusion of the poll and the consequences are

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envisaged in such provisions. The contention of the learned Senior Counsel for the Commission to the effect that the consequence envisaged under Section 28A is only confined to particular period and, therefore, the Election Commission can also exercise effective control such as transfer of unwanted officer during the other period as such a situation is not contemplated under the R.P. Act, is not acceptable as it would convert the Election Commission to an *imperium in imperio*. If this logic is accepted, it can as well be contended that the Election Commission in its discretion can extend the period of ban contemplated under Sections 126 and 135C of the R.P. Act, 1951 on the ground that such ban would be more conducive for a fair election. When specific provisions have been made, it is obvious that the Election Commission cannot fall back on its plenary power under Article 324(1) or 324(6) as such jurisdiction has to be read along with other provisions of the Constitution including any provision contained in the R.P. Act, 1950 and the R.P. Act, 1951, as categorically held in several cases, including *Mohinder Singh Gill's case* and *A.C. Jose case*. If such a contention is accepted, it would be obviously have the effect of amending or enlarging the scope of Section 28A or Section 126 or Section 135C of the R.P. Act, 1951.

53. Learned counsel appearing for the Election Commission has placed strong reliance upon Communication No.437/6/2006-PLN III (Vol-IV) dated 19.12.2005 issued by the Election Commission to the Chief Secretaries of 5 States / Union Territory, including Tamil Nadu, where elections are to be held in 2006. It has framed certain guidelines regarding posting of various officers connected with the Elections and issued instruction regarding transfer of the officials. It is stated by the learned Senior Counsel for the Commission that no objection had been raised by the Tamil Nadu regarding enforcement of such instructions and the very fact that the Government had come forward to protest against the order regarding transfer of Police Commissioner, who is holding a key post itself, is suggestive of the fact that the party in power, which is obviously looking forward to the election, considers the retention of the Officer at Chennai essential for furtherance of its election prospects.

We do not think that the learned Senior Counsel for the Election Commission is justified in making such a sweeping submission merely because the State Government has come forward to file the writ petition challenging the order of transfer. The question raised relates to an important facet of delineation of the extent of respective jurisdiction of the Election Committee vis-a-vis the State Government and need not be perceived as an attempt on the part of the State Government to hang on to a particular officer. The reasons given in the letter of the Chief Secretary dated 14.3.2006 cannot be said to be totally out of place deserving a rather dismissive reply.

54. Learned counsel appearing for the State has contended that the order has been passed without following the principles of natural justice. The power sought to be exercised is more or less an administrative power and it cannot be said that such a direction regarding

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transfer is required to be made only after compliance with the principles of natural justice. However, as already noticed, many of the provisions contained in both the Acts relating to posting of electoral officials envisage consultation with the State Government. Therefore, it would be always more appropriate for the Election Commission to take the concerned Government into confidence in a particular case instead of trying to pass an order as if it is a big brother. Similarly, even where the direction issued by the Commission, as in the present case, may not be strictly coming within the jurisdiction of Article 324(1) or the provisions contained in various Acts, the State Government can always consider such direction as a request or advice to be acted upon appropriately. The Government is also required to ponder if such a request would come after notification is issued, the State may not be in a position to resist such a request. Therefore, matters can always be finalised between the two Constitutional functionaries on the basis of mutual respect and confidence rather than in the spirit of imposition and conflict.

55. Mr.N. Jothi, appearing for the petitioner in W.P.No.8032 of 2006, has submitted that the order of transfer in the peculiar background, should not have been passed merely at the behest of the intervenor A. Raja, who happens to be a Minister of the Central Government, even without calling for any comments from the State Government and the police officer concerned. He has further submitted that as per the own decision of the Election Commission dated 28.3.1994, available at Page No.2.837 of Manual of Election Laws by Bahri, any person who is transferred on the basis of perceived notion of the Election Commission regarding any violation is stigmatised and as per the notification of the Election Commission he cannot be given any election duty in future. Such order is extracted hereunder :-

> **Election Commission's Orders on Conduct of Free and Fair Elections.**
>
> **" I. Appointments of Election Staff and Disciplinary Control –** No.100/94-PS-1 dated 28th March 1994.
>
> 4. Commission hereby directs that any official against whom any disciplinary action was taken under section 13CC of the Representation of the People Act, 1950 and section 28A of the Representation of the People Act, 1951 during earlier general or bye-elections shall not be drafted for any election related work whatsoever during ensuing elections to Parliamentary and Assembly Constituencies.
>
> Commission hereby further directs that such officials, if any, should be replaced forthwith. Your proposal for their immediate replacement shall be sent to commission for its approval after selecting a suitable substitute with proven record of dedication and fairplay. In no case any official against whom

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action has been taken under section 13CC or section 28A should handle election related work."

56. It is of course true that in the counter affidavit of the Election Commission it has been indicated as if the impugned direction has been issued by virtue of exercise of power under Article 324 of the Constitution read with 13CC of the R.P. Act, 1950. However, as already analysed and practically conceded by the learned counsel for the Election Commission and all the intervenors, Section 13CC of the R.P. Act, 1951 is not applicable. Therefore, it cannot be said that this direction of the Election Commission operates as a stigma requiring any compliance with the principles of natural justice, so far as the officer is concerned.

57. Even though it may not be held that the principles of natural justice are required to be followed while issuing direction regarding transfer, keeping in view the various provisions contained in the R.P. Act, 1950 and R.P. Act, 1951, which specifically envisage consultation with the State Government by the Election Commission relating to posting of particular officials, it would have been more appropriate on the part of the Election Commission to have consulted the State Government in this case. In the present case, the reply given by the Chief Secretary deserved a better treatment rather than being rejected in a curt manner, more particularly keeping in view the fact that one was representing the State Administration and the other is a high Constitutional authority.

58. So far as his contention that the Election Commission should not have acted merely on the basis of the allegation made by the Minister of the Central Government without trying to ascertain the background in which the alleged statement is made, it was stated by the counsel for the Election Commission that, as a matter of fact, the comment on the basis of which direction was issued, was published in Chennai Chronicle on the basis of which direction was issued as the Commission felt that continuance of the police officer shall not be conducive to the conduct of fair and free election, was in fact received by the Commission on 13.3.2006 as indicated in the counter affidavit, whereas the Minister has written the letter to the Commission only on 14.3.2006, which was in fact received by the Commission ion 16.3.2006. It is therefore submitted by him that the assertion of the petitioner in W.P.NO.8032 of 2006, namely, Thiru. Lakshmi Narayanan, is factually incorrect.

Even though in the counter affidavit this position has not been clearly spelt out, the learned counsel for the Election Commission has circulated some of the official papers which prima facie indicate that the copy of the Chennai Chronicle containing various statements made by various personalities, including the Police Commissioner, was received in the Election Commission's office on 13.3.2006. However, the file produced does not indicate the identity of the person who has sent such copy nor does it indicate as to the method in which it was received, i.e., by post or by hand delivery. It may however be indicated that in an additional

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affidavit filed on 27.3.2006, on which date the hearing was concluded, it has been stated that the concerned newspaper report had been received by the Election Commission from two persons including one from the Chief Electoral Officer on 13.3.2006 itself. However, since the Election Commission has *suo motu* jurisdiction to act in such matters, it is immaterial as to how the matter is brought to the notice of the Election Commission. Even though the Election Commission in its affidavits could have been more forthcoming by giving the details regarding such communication and the manner in which it was received, in the absence of any specific assertion that the Election Commission has abdicated its discretion being pressurised by any Minister, it is not necessary to delve further in such matter.

59. Mr. Jothi has also contended that the past experience indicates that lot of controversies are raised regarding the enforcement of the Model Code of Conduct and the consequences, and the Commission is passing adhoc orders from time to time without any consistent stand which gives scope for apprehension in the minds of different political parties and personalities. It is therefore submitted by him that instead of acting in such manner it would be always more appropriate for the Commission to seek framing of appropriate statutory Rules.

60. It is not for this Court to come to any particular conclusion on this submission as in our opinion such matter should be best left to the discretion of the Commission to consider as to whether detailed statutory rules can be framed with a view to avoid unnecessary controversies in future.

61. Learned counsels appearing for the parties who have challenged the order of the Commission have stated almost in one voice that the remark of the Police Commissioner reported in Chennai Chronicle has been grossly overblown regarding possible impact on the election. It has been submitted and, in our view, not entirely without some justification that the statement made in the context of International Women's day does not even remotely suggest anything regarding the election and a mountain should not have been made out of a mole-hill. Mr. Shanti Bushan appearing for the Intervenor Mr.A. Raja on the other hand has submitted that since the Police Commissioner is occupying an important and sensitive post, his statement is very likely to cause apprehension in the minds of many and likely to influence the opinion of a voter. Learned counsel for the Commission has submitted that the Commission in its own wisdom thought that such statement was likely to impair the fair election and it is not for this Court to substitute its opinion and the subjective opinion of the Commission cannot be tested in an objective manner by a Court.

62. Even though there appears to be some justification in the submission made by the petitioners that the matter has been unnecessarily blown out of proportion, yet keeping in view the restricted scope of

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interference by the High Court while exercising jurisdiction under Article 226 in such matters, we are not able to persuade ourselves to come to a definite conclusion that the order of the Commission was based entirely on irrelevant consideration. Whether the statement was intended to influence or sway any voter or not, there was a slim possibility of such statement being misconstrued. The Police Commissioner possibly could have been a little more circumspective before making any statement which was likely to raise eyebrows or at least a flutter.

63. In course of hearing, learned counsels appearing for the Election Commission as well as the intervenors, who are supporting the Election Commission, had raised a question regarding maintainability of the three writ petitions filed by the three retired Director General of Police. It has been contended by them that the question relating to transfer cannot be raised by way of any public interest litigation. It is also contended that at any rate the three petitioners, namely, the three former Directors General of Police, do not have enough credential to file any public interest litigation in the matter and as such have no locus standi to file such writ petitions.

64. The right of the State Government to file the writ petition is not in question, even though questions have been raised regarding motive of the State Government in filing of such writ petition. Since the questions raised are common in the writ petition filed by the State as well as the three writ petitions filed by the three former Directors General of Police and since the writ petition filed by the State Government is otherwise maintainable, it is not necessary to consider specifically this aspect of the matter. Similarly, the maintainability of the writ petition filed by Thiru. Adaikalam to enforce the order passed by the Election Commission may be in doubt, but it is not necessary to be decided in the present case. All these questions are left open to be decided in future if and when such occasion arises.

65. Mr.R. Viduthalai, learned Senior Counsel appearing for Mr.A. Raja in W.P.No.8126 of 2006, while supplementing the submissions made by the learned Senior Counsel Mr. Shanthi Bushan, has also raised the question of maintainability of the writ petitions on the anvil of the decision of the Supreme Court in *L. Chandra Kumar's* case. He has contended that the question relating to validity of transfer of a police officer belonging to Indian Police Service can be raised before the Central Administrative Tribunal and not directly before the High Court and only when the matter is decided by the Central Administrative Tribunal, a writ petition can be filed against such decision of the Central Administrative Tribunal and, therefore, the writ petitions filed either by the State Government or by the three former Directors General of Police are not maintainable.

66. In our considered opinion, there is a short, but not

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necessarily sweet answer to this. The question in issue in the present case is not regarding transfer of any official as such, but regarding jurisdiction of the Election Commission to issue any direction regarding transfer of an officer. What is in issue in the present case is the legality or validity of the direction issued by the Election Commission and not the legality or the validity of any transfer order as such. As a matter of fact, transfer order, if any, is to be passed by the State Government and no transfer order has been passed as yet. Moreover, the direction is being challenged by the State Government and not by the officer concerned. In such view of the matter, it cannot be said that the question could have been raised before the Central Administrative Tribunal. The observation made by Justice K.G. Balakrishnan of the Kerala High Court, as His Lordship then was, in **1995 Labour I.C 682** (cited supra) repelling a similar contention in that case is appropriate.

67. Mr. Elephant Rajendran, learned counsel appearing for the intervenor, namely, Nagaimugan, has relied upon the decisions of Allahabad High Court in **AIR 2002 ALL 73 (LALJI SHUKAKLA & ANOTHER v. ELECTION COMMISSION OF INDIA AND ANOTHER).** The order of transfer as such was in question by the concerned transferred officer in such case. The question now raised regarding the authority of the Election Commission vis-a-vis that of the State Government regarding control to be exercised over a particular officer even before issuance of notification under Section 15 of the R.P. Act, 1951 was not in issue in any of these cases. This case is clearly distinguishable.

68. For the aforesaid reasons, we come to the following conclusions :-

The impugned communication dated 14.3.2006 and the consequential communication dated 16.3.2006 need not be considered as a binding direction to the State Government under Article 324 of the Constitution or under Section 13CC of the R.P. Act, 1950 or Section 28A of the R.P. Act, 1951. However, notwithstanding the above conclusion, since the Election Commission will get ample power to issue such direction regarding transfer of a designated police official after publication of the notification under Section 15 of the R.P. Act, 1951, it would be open to the State Government to take appropriate decision in the matter in further consultation with the Election Commission. In this connection, it would be appropriate to recall the sentiments expressed by Justice D. Raju, while speaking for the Division Bench in W.A.Nos.756 & 757 of 1995, to the following effect :-

> "... But, at the same time, we do make it clear that the State Government also must be alive to its responsibilities and obligations to assist the Election Commission in all respects, act with great care, caution and circumspection depending upon the practicalities of the situation and adopt a pragmatic path...".

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We may also add that even though under law it may not be obligatory on the part of the Election Commission to comply with the principles of natural justice while directing transfer of a particular officer the provisions contained in R.P. Act, 1950 or R.P. Act, 1951 regarding consultation with State Government in the matters relating to nominating various State officials as Chief Electoral Officer, District Election Officer, etc., should not be lost sight of and the Election Commission should develop a healthy convention of taking the concerned State Government into confidence rather than issuing "diktat" in the matters relating to transfer of key officials. It should not be forgotten that the Election Commission and the State Government are two high Constitutional functionaries and not petty officers quibbling over small matters.

69. In the result, all the writ petitions are disposed of, subject to the observations made earlier in the judgment and the directions contained in the preceding paragraph. There would be no order as to costs. Consequently, the connected WPMPs are closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

dpk

To

1. The Chief Secretary,
   State of Tamil Nadu,
   Fort St. George,
   Chennai 600 009.

2. The Chief Election Commissioner,
   Election Commission of India,
   New Delhi.

3. The Chief Electoral Officer,
   Public (Elections) Department,
   Secretariat,
   Chennai 600 009.

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+ 1 CC to Mr.Elephant G. Rajendran, Advocate SR NO 15787

+ 1 CC to M/s.S.R.Rajagopal, Advocate SR NO 15779

+ 1 CC to M/s.G.R.Associates Advocate SR NO 15815

+ 1 CC to Mr. R.Viduthalai, Advocate SR NO 15865

+ 1 CC to Mr. R.Parthiban, Advocate SR NO 15808

+ 5 CCs to Govt. Pleader SR NOS.15808 TO 15892

W.P.NO.7720 of 2006 &
batch
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